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In The

Supreme Court of the United States

Term, 1968

No. 332

DAVID BRUCE MOSKOWITZ,

Petitioner,

- v -

J. WINSTON KINDT,
COMMANDER EDWARD O'MALLEY,
HONORABLE STANLEY RESOR and
HONORABLE ROBERT MacNAMARA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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To the above, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

David Bruce Moskowitz respectfully petitions, by his counsel, Abraham J. Brem Levy, Esquire, for a writ of certiorari to review the decision of the United States Court of Appeals for the Third Circuit filed May 13, 1968, which affirmed an order of the United States District Court for the Eastern District of Pennsylvania dated August 31, 1967,

and filed September 5, 1967, sustaining the respondent's motion to dismiss complaint for lack of jurisdiction over the subject matter.

CITATIONS TO OPINIONS AND ORDERS BELOW

The opinion of the trial court (R46a to R51a) (unreported), is printed in Appendix A, hereto.

The opinion of the United States Court of Appeals for the Third Circuit (unreported) is printed in Appendix B, hereto.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 2101.

QUESTIONS PRESENTED

1. Was the petitioner, a student classified II-S denied constitutional due process when his local draft board changed his classification to I-A (0) on the advice only of the college he was then attending that he had withdrawn; without affording him an opportunity to explain that he was continuing his education toward a baccalaureate degree and had not actually interrupted his education?

2. Was the petitioner denied constitutional due process when he appeared at the offices of his local draft board for the purpose of taking a timely appeal from reclassification and was prevailed upon by the clerk on duty not to take such an appeal?

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are in the Fifth Amendment which provides:

> "...nor be deprived of life, liberty or property without due process of law. ..."

and Section 1 of the Fourteenth Amendment containing the due process clause which provides:

> "...nor shall any state deprive any person of life, liberty or property without due process of law. ..."

STATEMENT OF THE CASE

This is an appeal from the decision of the United States Court of Appeals for the Third Circuit affirming the judgment of the United States District Court for the Eastern District of Pennsylvania which dismissed petitioner's complaint for declaratory and injunctive relief on the ground of lack of jurisdiction over the subject matter.

The prayer for an injunction was contained in a complaint for a declaratory judgment filed on August 14, 1967, by the petitioner, a student registrant (No. 36-106-47-630) for the draft under the Selective Service System.

The District Court granted a temporary injunction and held an evidentuary hearing on the prayer for a permanent injunction which revealed the following: petitioner, a twenty year old student registered for the draft upon graduation from high school and was assigned Selective Ser-

vice No. 36-106-47-630. He then enrolled as a full time student in Franklin and Marshall College and classified II-S by Local Board No. 106.

Petitioner completed ten courses in three full semesters of study, but on January 24, 1967, was requested to and did withdraw from college because of low passing grades ("D").

On February 6, 1967, petitioner was accepted by Temple University as a part time student until he demonstrated his ability to earn "B" grades, at which time he would be accepted as a full time student in September 1967.

The local board was informed by Franklin and Marshall College of the withdrawal of January 24, 1967, and on March 17, 1967, reclassified petitioner 1A (0); this without notice or hearing.

On March 21, 1967 (within the ten day period then in effect for taking an appeal), petitioner presented himself to the board, and after informing the clerk on duty of his attendance at Temple University and the agreement to register him as a full time student if he attained "B" grades in the subjects he was then pursuing, requested permission to file an appeal from the 1A (0) classification. He was advised to wait until the result of his studies at Temple University was determined and was given the impression that if he were successful, he would be reclassified II-S.

He continued his studies at Temple University and was ordered in for pre-induction examination on June 23, 1967.

On June 23, 1967, immediately after the successful completion of the courses he had been taking, he enrolled for two additional courses at Temple University to carry forward his education.

On July 24, 1967, he was notified by the local board that he was to be inducted into the Armed Forces of the United States on August 15, 1967, at 6:30 a.m.; whereupon, he notified the board that he was still waiting for the results of his studies.

On August 7, 1967, he was accepted (Temple University) as a full time student for the term beginning September 1967.

The official notification from Temple University of acceptance as a full time student was then delivered to the local board and request was made for II-S classification. The board referred the matter to Harrisburg which refused reclassification on August 9, 1967. New student deferment forms were authenticated by Temple University and filed on August 16, 1967.

The request was resubmitted to Harrisburg which again refused reclassification on the ground that petitioner had not taken a timely appeal from the March 17, 1967 classification.

Petitioner again asked for instructions as to how he could get relief and was referred to Appeal Agent Daniel Rothman, Esq. Mr. Rothman informed him that he (Rothman) was a volunteer, received no compensation, and earned his living practicing law and could not give him any time, and that he should get ready for induction.

On August 14, 1967, a complaint seeking a declaratory judgment and an injunction was prepared and filed, a temporary restraining order granted, and an evidentuary hearing held on August 18, 1967.

On August 31, 1967, the District Court entered an order granting respondents' motion to dismiss the complaint for lack of jurisdiction.

On September 5, 1967, the petitioner was notified of the court's decision.

This appeal followed on September 7, 1967.

REASONS FOR GRANTING THE WRIT

I. The petitioner, a student classified II-S was denied constitutional due process when his local draft board changed his classification to IA(O) on advice only of the college he was then attending that he had withdrawn without affording him an opportunity to explain that he was continuing his education toward a Baccalaureate Degree and had not actually interrupted his education.

On August 18, 1967, at the hearing for a permanent injunction, the petitioner testified that immediately upon withdrawing from Franklin and Marshall College (January 24, 1967) where he had satisfactorily completed ten courses of instruction albeit with the lowest passing ("D") grades, he applied to Temple University of Philadelphia for registration as a student.

He did not notify his draft board of his withdrawal being aware however that the college would do so.

Upon application for registration as a student at Temple University on February 6, 1967, he was informed that he must first demonstrate that he merited such acceptance by taking several courses on a probationary basis, and if he passed with "B" grades he would be accepted as a full time student in the September 1967 Class.

The local draft board upon receipt of advice from Franklin and Marshall College that the defendant had withdrawn from the college immediately changed his classification from II-S to IA (O). This action was taken without any previous notice to the registrant and without having afforded him an opportunity to explain his activity in actually furthering his education towards earning a baccalaureate degree.

If the local draft board had not by the action of its clerk on March 21, 1967, effectively denied the registrant the opportunity to take a timely appeal, he would have been able to convince it that he did not interrupt his education and was continuing it in an effective manner.

When the registrant appeared at the office of the local board on March 21, 1967, he informed the clerk then on duty that he wanted to take an appeal and then apprised her in great detail of his probationary registration as a student at Temple University. The board's clerk advised him that any appeal he would take would avail him nothing (even though it was her duty and that of the appeal agent to assist him in any manner they could to perfect an appeal) and if he were successful in securing "B" averages in the courses he was then taking at Temple University she was of the

opinion that the board would change the classification back to II-S. Lulled into a sense of security, he was prevailed upon not to file an appeal from the IA(O) classification.

We respectfully suggest that this matter does not pose the question of a review of a draft board's (final) action of classification, but rather is a prayer for a declaratory judgment that the registrant was denied constitutional due process.

In 28 U.S.C. 2201, under the heading "Declaratory Judgments — Creation of Remedy," we find the Authority for the Remedy of Declaratory Judgments: June 25, 1948, C 646, 62 Stat. 964 as amended.

Article III, Constitution of the United States, § 2, Clause 1, states:

> "The judicial power shall extend to all cases in Law and Equity arising under this constitution — the Laws of the United States, etc."

In Public Affairs Associates v. Rickover, 369 U.S. 111, 7 L. Ed. 2d 604, the Supreme Court held that the Declaratory Judgment Act authorizes the federal courts to make a declaration of rights.

Appellant here claims a deprivation of due process when he was prevailed upon (actually prevented) by the local draft board's clerk from taking a timely appeal on March 21, 1967, from the March 17, 1967, IA(O) Classification, and when he was denied assistance by the appeal agent and when he was not permitted to appear and explain how he was furthering his education.

In the Rickover case, 369 U.S. 111, the court said:

> "Declaratory judgment like other forms of equitable relief should be granted as a matter of judicial discretion exercised in the public interests."

Significantly, the record of the hearing on August 18, 1967, is devoid of any testimony by the local board or the appeal agent denying the statement of the registrant of his discussion with the clerk. The only reference was the testimony of the chief clerk who stated she did not remember talking with the registrant, but not a word about any other clerk who may have been on duty.

The respondents were content with offering only the registrant's record which made no reference to any conversation or advice by the board's employee.

In Rickover, in a separate opinion by Mr. Justice Douglas (Concurring), deplores the inhospitable approach of the courts to litigation to vindicate private rights and complains that oft times a person must risk going to jail or losing his job in order to get relief before the court will take jurisdiction by using the issue of "ripeness of an issue for judicial review brigaded with the appropriateness of declaratory relief."

In 5 U.S.C. § 1009, under the heading "Judicial Review of Agency Action," we find the following:

> "(a) Any person suffering legal wrongs because of any agency action, or adversely

> affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof."

In Atkins v. United States, 204 F.2d 269 (10th Cir.), the court refers to registrant's right to make written requests for an opportunity to appear in person before a local board to discuss his classification:

> "Failure to accord a registrant the procedural rights provided by regulation makes void an order to report for induction."

thus, effectively denying to a registrant procedural due process.

Did the registrant interrupt his education?

The Federal Register of July 4, 1967 (Vol. 32, No. 128, Part II) contains Executive Order 11360, which implements provisions of the new selective service act, now Public Law 90-40, 90th Congress, S1432, June 30, 1967, refers to undergraduate deferments. This regulation points up what is meant by "full time course of instruction at a college or university, etc." and is defined by the regulation to mean:

> "A student shall be deemed to be 'satisfactorily pursuing a full-time course of instruction' when, during his academic year, he has earned, as a minimum, credits toward his degree which, when added to any credits earned during prior academic years, represent a proportion of the total number required to earn his degree at least equal to the

> proportion which the number of academic years completed bears to a normal number of years established by the school to obtain such degree."

This New Selective Service Regulation would indicate that a student is to be deemed attending college on a "full time basis" if he does that which will earn him a baccalaureate degree in the time allotted by the college for such completion.

In the case here under consideration, the registrant was pursuing a course of instruction which would earn him a baccalaureate degree in the time allotted for such completion, and if he had been permitted to take an appeal from the reclassification he would have been able to satisfactorily prove to the board that he was so engaged.

The action of the local draft board's clerk in prevailing upon the registrant not to take an appeal effectively prevented the taking of such an appeal and accordingly having relied upon that advice to his prejudice and not being able to explain his education program was a denial of constitution due process as guaranteed by the Fourteenth Amendment.

II. The petitioner was denied constitutional due process when he appeared at the offices of his local draft board for the purpose of taking a timely appeal from reclassification and was prevailed upon by the clerk on duty not to take such an appeal.

The District Court's determination to dismiss the complaint for lack of jurisdiction was foundationed on the ground that the controversy came before the court "neither upon a petition for a writ of habeas corpus by a registrant already inducted into the armed services nor as a defense to a criminal prosecution by a registrant resisting induction."

Although it is true the registrant here did not wait to be inducted and then file a petition for a writ of habeas corpus nor did he refuse induction; but having received an induction order sought relief in the District Court because he was convinced that the order of the local draft board was an arbitrary act beyond its jurisdiction.

The district court judge refers to the finality of the local board decision: (App. U.S.C. § 460 (b) (3) [1964]), and excludes itself from judicial review to which action by an administrative agency is normally subject, 50 App. U.S.C. § 463 (b) (1964), and then cites Estep v. United States, 327 U.S. 114, as authority for holding that it had no jurisdiction to entertain the matter.

We respectfully disagree that Estep so holds. In that case although it does contain the language quoted, the court failed to give weight to the decision of the court that local boards must conform to the rules and regulations prescribed by

the president, and that the decisions of local boards shall be final except where appeals are authorized; and that the silence of Congress as to judicial review is not an absolute denial of the federal courts to grant relief and ends up by holding that where local boards act in violation of these rules the action would be lawless and beyond their jurisdiction.

In Estep the court then discusses situations where the decisions of local boards were in defiance of the law, and the conclusion reached is:

> "In all such cases its action would be lawless and beyond its jurisdiction."

The court then went on to discussions of Congress' intent when it made the local board's action "Final" and reversed on the ground that the petitioners were denied an opportunity to prove that the local board acted beyond its jurisdiction, and that there is a lack of procedural due process or where there is an act by the board which may be constitutionally invalid or issued by mistake the decision cannot stand.

In dealing with a question of personal liberty of the individual, a denial of constitutional due process far transcends any technical interpretation of a statute. Here, the registrant presented himself at the office of the local board within the ten day period then allowed to take an appeal and was denied that legal right by the board's clerk then on duty when she presumed to advise him against such action and prevailed (prevented) upon him not to take an appeal, lulling him into a sense of security that the board would reclassify him into

II-S when he shall have successfully completed the course he was then taking at Temple University in furtherance of his education.

This is particularly true in the light of the duty which devolved upon that clerk and appeal agent to assist in every manner any registrant to perfect the taking of an appeal.

In Wolff v. Selective Service Local Board No. 16, 372 F.2d 817 (1967) (2nd Cir.), the issues are very close to the case here under consideration.

That case involved a reclassification of two registrants from II-S to IA, because of participation in a demonstration protesting American involvement in Viet Nam at the Selective Service Local Board's office in Ann Harbor, Michigan.

In that case, the registrants claimed violation of their First Amendment privileges; whereas, in this case, the registrant claims a violation of his Fifth and Fourteenth Amendment privileges, and used the following significant language to define its position:

> "Since it is the mere threat of unconstitutional sanctions which precipitates the injury, the court must intervene at once to vindicate the threatened liberties."

In the case at bar, the petitoner was effectively denied constitutional due process as guaranteed by the Fifth and Fourteenth Amendments when a board's employee instead of carrying forward her clear duty to assist him in any way she knew how to perfect an appeal instead of prevailing upon him

not to file such an appeal but to await the outcome of other activity in which he was then engaged in furthering his education.

Thus, here we have a clear violation of basic constitutional rights which the court discussed as follows:

> "(19-20) Where basic constitutional rights are imperiled, the courts have not required a series of injured parties to litigate the permissible scope of the statute or administrative interpretation but have nullified the unconstitutional action and required the government to start in the first instance with a statute or interpretation that will not so overhand free expression that the legitimate exercise of constitutionally protected rights is suppressed. See also NAACP v. Button, supra; United States v. Raines, 362 U.S. 17, 80 S. Ct. 519, 4 L. Ed. 2d 524 (1960); Winter v. People of State of New York, 333 U.S. 607, 68 S. Ct. 665, 92 L. Ed. 840 (1948). In our case intervention is especially appropriate because for reasons independent of the First Amendment the entire course of conduct of the appellee boards is illegal and cannot be saved by any amount of narrowing construction."

As to the respondents' contention that the review of classification orders is possible only in criminal proceedings or in habeas corpus petitions, the court said:

> "Wholly aside from the First Amendment consideration which we believe compel our

intervention at this time, it has in the past been suggested that when a local board acts in flagrant disregard of the applicable regulations and thus in clear excess of its jurisdiction, the courts may intervene at any time to rectify the situation."

CONCLUSION

For the foregoing reasons your petitioner prays that a Writ of Certiorari issue directed to the United States Court of Appeals for the Third Circuit to the end that this cause may be reviewed and determined, and that the judgment of the United States Court of Appeals for the Third Circuit be reversed and for such other and further relief as may seem proper.

Respectfully submitted,

ABRAHAM J. BREM LEVY
Counsel for Petitioner
David Bruce Moskowitz

APPENDIX A

In The United States District Court for the Eastern District of Pennsylvania

Memorandum Opinion

(Filed)

This is a motion to dismiss the complaint of a twenty-year-old student who seeks a declaratory judgment and an injunction to prevent his induction into the United States armed forces.

Plaintiff was originally classified I-A-O on August 26, 1965, which qualified him as a "conscientious objector available for noncombatant military service only," 32 C.F.R. sec. 1622.11 (1967). After becoming a full-time student at Franklin and Marshall College, plaintiff was reclassified II-S, and hence deferred from military service, 32 C.F.R. sec. 1622.25 (1967). On January 24, 1967, plaintiff was requested to withdraw from Franklin and Marshall College; this he did without notifying his Local Board No. 106 of his change in status as required by 32 C.F.R. sec. 1625.1(b), as plaintiff had reason to know from the instructions in his Notice of Classification SSS Form 110 which was then in his possession.

Notification of plaintiff's withdrawal was received subsequently from the College by Local Board No. 106, which thereafter reclassified plaintiff I-A-O on March 21, 1967, notifying him of its action as required, 32 C.F.R. secs. 1625.12, 1623.4 (1967). At this point plaintiff had ten days within which to file a written appeal pursuant to the regular Selective Service System appeals procedure, 32 C.F.R. secs. 1625.13, 1626 (1967).

This he did not do, and, after passing his pre-induction physical, he was ordered on July 24, 1967 to report for induction as a noncombatant on August 15, 1967. It is this order that is the subject of the instant motion.

Shortly after his withdrawal from Franklin and Marshall plaintiff entered Temple University as a part-time student. After a provisional period of study, he was accepted by Temple as a full-time student, to begin in the fall of 1967, notice of which was duly authenticated by the University and returned to Local Board No. 106 on August 10, 1967. It was during this period of part-time studies that plaintiff complains of being denied constitutional due process, both because of alleged advice from the Board clerk on March 21, 1967 to postpone his appeal from the I-A-O classification until plaintiff was certain of his acceptance to Temple University as a full-time student and by the alleged lack of cooperation of the appeal agent upon whom plaintiff called for advice.

Whether plaintiff's allegations have substantive merit is not properly before the court at this juncture. To be sure, the appeal agent is mandated by law to appeal any classification which, "in his opinion, should be reviewed by the appeal board," and to be "equally diligent in protecting the interests of the Government and the rights of the registrant in all matters," 32 C.F.R. sec. 1604.71 (d) (1967). Nonetheless, it is well established by statute and judicial gloss that this court has no jurisdiction over plaintiff's complaint in its present posture.

Appendix A

The Universal Military Training and Service Act, in effect both when plaintiff was reclassified I-A-O and when he was ordered to report for induction, provides that the "decisions of [the] local board shall be final..." App. U.S.C. sec. 460(b) (3) (1964). The Act, moreover, excludes itself in terms from the judicial review to which action by any administrative agency is normally subject, 50 App. U.S.C. sec. 463(b) (1964). Compare Administrative Procedure Act sec. 10, 5 U.S.C. sec. 1009 (1964). The Supreme Court, interpreting the identical language of the 1940 Act, specified, in the landmark case of Estep v. United States, 327 U.S. 114 (1946) that:

> The provision making the decisions of the local boards "final" means to us that Congress chose not to give administrative action under this Act the customary scope of judicial review which obtains under other statutes. It means that the courts are not to weigh the evidence to determine whether the classification made by the local boards was justified. The decisions of the local boards made in conformity with the regulations are final even though they may be erroneous. The question of jurisdiction of the local board is reached only if there is no basis in fact for the classification which it gave the registrant.

Id. at 112-23.

This understanding has been affirmed without exception to date, e.g., United States v. Seeger, 380 U.S. 163, 185 (1965); Wolff v. Local Board No. 16, 372 F.2d 817, 823 (2d Cir. 1967); United

States v. Spiro, No. 16073, 3d Cir. August 29, 1967; Muhammad Ali v. Connally, 266 F. Supp. 345, 346-47 (S.D. Texas 1967). In addition, the Military Selective Service Act of 1967, effective June 30, appears to have consciously written the Estep language into statutory law by adopting the House "restatement of the law as it exists today," 113 Cong. Rec. S8052 (daily ed. June 12, 1967) (summary of joint conference report) for the amendment to 50 App. U.S.C. 460(b) (3) (1964):

> No judicial review shall be made of the classification or processing of any registrant by local boards ... except as a defense to a criminal prosecution ... Provided: That such review shall go to the question of the jurisdiction herein reserved to local boards ... only when there is no basis in fact for the classification assigned to such registrant.

Pub. L. 90-40 sec. 8(c), 81 Stat. 104 (1967); see 113 Cong. Rec. H6284, H6888 (daily ed. May 25 & June 8, 1967).

Furthermore, a second and equally unbroken line of authority permits the court to assume jurisdiction to review draft board action only in two instances; namely: "either in a petition for habeas corpus or as a defense to prosecution for failure to submit to induction into the armed forces," Witmer v. United States, 348 U.S. 375, 377 (1955); accord, United States v. Capson, 347 F.2d 959, 962 (1965); Goldstein v. MacNamara, Civil No. 42979, E.D. Pa., June 27, 1967, aff'd, No. 16,699, 3d. Cir., July 5, 1967; Muhammad Ali, supra at 347. But see Wolff, supra at 825-26.

Together these restrictions on judicial inquiry into Selective Service System action make the range of review one that has been aptly termed "the narrowest known to the law." Blalock v. United States, 247 F.2d 615, 619 (4th Cir. 1957).

It may well seem offensive for a registrant, in a given meritorious case, to be forced to test the validity of an induction order by way of a defense to a criminal prosecution for resisting induction or by way of petition for a writ of habeas corpus once he is inducted; adverse criticism from the law journals is not lacking, e.g., Estep, supra at 129-32 (Murphy, J., concurring); Comment, 114 U. Pa. L. Rev. 1014, 1018, 1023, 1048-49 (1966); Comment, 76 Yale L.J. 160, 172-73, 190-911 (1966). Nonetheless, both the statutory and the common law to date unite in authorizing jurisdiction to review Selective Service action solely in these ways. Although the 1967 amendment speaks of review as available only "as a defense to a criminal prosecution..." Pub. L. 90-40 sec. 8(c), 81 Stat. 104 (1967), it is at least open to question whether a statute could constitutionally preclude a challenge to a draft classification properly raised on habeas corpus. Cf. U.S. Const. art. I sec. 9 cl. 2; Estep, supra at 125, 132 (Murphy & Rutledge, JJ., concurring); H. Hart & H. Wechsler, the Federal Courts and the Federal System 317-19, 323-325 (1953).

In any event, since the instant controversy comes before the court neither upon petition for a writ of habeas corpus by a registrant already inducted into the armed services nor as a defense to a criminal prosecution by a registrant resisting induction, the court has no jurisdiction to enter-

tain the matter. Cf. Feldman v. Local Board No. 22, 239, F. Supp. 102 (1964).

ORDER

AND NOW, August 31, 1967, defendant's motion to dismiss complaint for lack of jurisdiction over the subject matter is hereby GRANTED.

IT IS SO ORDERED.

s/ Charles R. Weiner
J.

APPENDIX B

United States Court of Appeals for the Third Circuit

No. 16907

Argued April 18, 1968

Before McLaughlin, Freedman and Seitz,
Circuit Judges

Opinion of the Court

(Filed May 13, 1968)

Per Curiam.

David Moskowitz appeals from the dismissal below of his complaint for declaratory and injunctive relief on the grounds of lack of jurisdiction over the subject matter. Moskowitz v. Kindt, 273 F. Supp. 646 (D.C.E.D. Pa. 1967).

Appellant was originally classified I-A-O by his Selective Service Local Board on August 26, 1965. Thereafter, he entered Franklin and Marshall College as a fulltime student and was reclassified 2-S by his local board. Appellant completed three semesters at Franklin and Marshall but was requested to withdraw on January 24, 1967 because of his low grades. After withdrawing he applied for admission to Temple University on February 6, 1967, but was told that he could not be accepted as a fulltime student

until he demonstrated his ability to attain higher grades. He was admitted, however, as a part-time student with the understanding that if he passed his courses with a "B" average, he would be accepted as a fulltime student in September, 1967.

Moskowitz never notified his local board of his withdrawal from Franklin and Marshall. The board received this information from the college and on March 17, 1967, it reclassified appellant I-A-O. Upon receiving his reclassification, appellant went to his local board to inform it of his conditional acceptance at Temple University. He alleges that he requested permission to file an appeal but was told to wait until he received the results of his studies at Temple.

Appellant continued his studies at Temple and in July, 1967 was notified by his board that he was to be inducted into the Armed Forces in August. Prior to the date of his induction, Moskowitz was informed that he had successfully completed his courses at Temple and would be accepted as a fulltime student starting in September, 1967. Temple officially notified the local board of this fact and appellant requested a 2-S classification. Appellant's local board told him he would have to apply to Harrisburg since his induction orders had already been issued. Appellant contacted Harrisburg and his request was denied. He then sought the assistance of an appeal agent and was referred to Daniel Rothman, Esq. After reviewing appellant's file, Mr. Rothman advised him that there were no grounds on which to appeal and that he should prepare himself for induction. Thereafter, appellant filed his complaint in the court below seeking to stay his induction.

Appendix B

Without doubt the District Court's action in dismissing appellant's complaint was correct. Estep v. United States, 327 U.S. 114 (1946); Falbo v. United States, 320 U.S. 549 (1944); United States v. Rumsa, 212 F.2d 927 (7 Cir. 1954), cert. denied, 348 U.S. 838 (1954); Muhammad Ali v. Connally, 266 F. Supp. 345 (D.C.S.D. Tex. 1967). In Estep, supra, the Supreme Court discussing the finality provisions governing the decisions of local draft boards stated:

> "The provision making the decisions of the local boards 'final' means to us that Congress chose not to give administrative action under this Act the customary scope of judicial review which obtains under other statutes. It means that the courts are not to weigh the evidence to determine whether the classification made by the local boards was justified. The decisions of the local boards made in conformity with the regulations are final even though they may be erroneous. The question of jurisdiction of the local board is reached only if there is no basis in fact for the classification which it gave the registrant. See Goff v. United States, 135 F.2d 610, 612." Estep v. United States, supra, 327 U.S. at page 122.

From the record before us we are unable to conclude that there is no basis in fact for the classification appellant received after withdrawing from Franklin and Marshall. Furthermore, appellant failed to exhaust his administrative remedies because he did not appeal the reclassification he received on March 17, 1967. Appellant's explana-

tion for this failure is that he was told not to appeal by someone in the office of his local draft board. It is significant, however, that at the hearing before the District Court, appellant failed to produce the person he alleges gave him this advice. This unsupported allegation does not rise to a due process violation.

Appellant's relief, if he is entitled to any, cannot be obtained in an action for a declaratory judgment and injunction. United States v. Rumsa, supra, 212 F.2d at page 938. Relief could only be obtained after appellant was either indicted for refusing to be inducted or by way of habeas corpus after induction. As the case was presented to the District Court, it is clear that it had no jurisdiction.

Appellant argues that Wolff v. Selective Service Local Board No. 16, 372 F.2d 817 (2 Cir. 1967) should operate here to enable this Court to grant relief at this juncture. In that case the registrants were fulltime students at the University of Michigan and were properly classified 2-S. They were reclassified by their local draft boards because of their participation in a demonstration protesting American involvement in Vietnam. Because of the chilling effect the local board's action would have on appellant's constitutional rights, Dombrowski v. Pfister, 380 U.S. 479 (1965), the Second Circuit concluded that subject matter jurisdiction was present.

> "Here it is the free expression of view on issues of critical current national importance that is jeopardized. On such topics perhaps more than any other, it is imperative that

> the public debate be full and that each segment of our society be permitted freely to express its views. Thus the allegations of the complaint in this case that the draft boards have unlawfully suppressed criticism must take precedence over the policy of non-intervention in the affairs of the Selective Service." Wolff v. Selective Service Local Board No. 16, supra, 372 F.2d at page 822.

The foregoing clearly distinguishes Wolff from the appeal presently before this Court.

The judgment of the District Court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit.

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 332

DAVID BRUCE MOSKOWITZ, PETITIONER

v.

J. WINSTON KINDT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioner was a full-time student at Franklin & Marshall College and as such received a II-S (student) deferment from his local draft board. In January 1967 he was requested to withdraw from school because of low grades. He then applied to Temple University, but was told that he could not be accepted as a full-time student until he demonstrated his ability to make higher grades. He was admitted, however, as a part-time student with the understanding that if he passed his courses with a B average he could enroll as a full-time student in September 1967.

Under the statute and regulations, a II-S student deferment requires the registrant to pursue a "full-time course of instruction." (P.L. 90-40, 81 Stat. 102, amending 50 U.S.C. App. 456(h)(1); 32 C.F.R. 1622.25(a)). Accordingly, when petitioner's local draft board learned that he was no longer a full-time student at Franklin & Marshall, it reclassified him, in March 1967, as I-A-O.[1] Petitioner asserts that he then went to his local board, told the clerk of his arrangement with Temple, and asked to file an appeal. He states that the clerk and the government appeal agent told him that he should not appeal, but should wait until he became a full-time student at Temple, and then seek reclassification as II-S.

On July 24, 1967, petitioner was ordered to report for induction as a non-combatant on August 15. On August 7, he was accepted as a full-time student by Temple University for the term beginning September 1967. He then brought this action seeking a declaratory judgment and an injunction against his induction. He alleged, among other things, that the advice of the clerk and the appeal agent resulted in a denial of due process. The district court dismissed the complaint for lack of jurisdiction (Pet. App. 17-22), and the court of appeals affirmed (Pet. App. 23-27).[2] Pe-

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[1] I-A-O is the classification for conscientious objectors available for non-combatant military service (see 32 C.F.R. 1622.11). This had been petitioner's classification before he entered Franklin & Marshall College.

[2] In addition to referring to the impropriety of petitioner's injunctive action under P.L. 90-40, 81 Stat. 104, amending 50 U.S.C. App. 460(b)(3) (Pet. App. 26), the court of appeals noted that it was "unable to conclude that there is no basis in

titioner's induction has been stayed pending completion of this litigation.

1. The courts below correctly held that they had no jurisdiction to review petitioner's classification prior to his induction. P.L. 90-40, amending 50 U.S.C. App. 460(b)(3) provides that "[n]o judicial review shall be made of the classification or processing of any registrant by local boards * * * except as a defense to a criminal prosecution * * * after the registrant has responded either affirmatively or negatively to an order to report for induction, or for civilian work * * *." The considerations being urged in *Oestereich* v. *Selective Service System Local Board No. 11*, No. 46, this Term, in which certiorari was granted on May 20, 1968, for avoiding this jurisdictional bar are not pertinent here. Since no suppression of free speech is alleged here, pre-induction judicial review cannot be sought as necessary to prevent a possible chilling effect on First Amendment rights.[3] Nor is any claim made here that

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fact" for petitioner's reclassification as I-A-O after his withdrawal from Franklin & Marshall (*id.* at 25), and also mentioned his failure to exhaust administrative remedies by not appealing his classification (*id.* at 25-26).

[3] The petitioner in *Oestereich*, who turned in his draft card and was reclassified as a delinquent and ordered inducted, claims that the purpose of the reclassification was to punish him for an action protected by the First Amendment, and that under *Dombrowski* v. *Pfister*, 380 U.S. 479, prompt judicial review is necessary to protect his First Amendment rights. *Wolff* v. *Selective Service Local Board No. 16*, 372 F. 2d 817 (C.A. 2), on which petitioner here relies (Pet. 14-16), similarly involved a reclassification allegedly resulting from the exercise of First Amendment rights (see Pet. App. 26-27), al-

petitioner is entitled to a statutory exemption from military training and service.[4] Finally, petitioner cannot maintain that he was in any respect subjected to an allegedly "punitive" reclassification. Instead, this is simply a routine Selective Service case of the type which the statute was clearly designed to cover.

2. Moreover, on the merits there is no basis for overturning petitioner's Selective Service classification. On March 17, 1967, when petitioner was reclassified I-A-O, he was not a full-time college student and thus was not entitled to a student deferment (see P.L. 90-40, amending 50 U.S.C. App. 456(h)(1); 32 C.F.R. 1622.25(a)). Accordingly, the clerk of the local board and the appeal agent correctly advised him that there was no basis for appeal. Nor was petitioner a full-time student when, on July 24, 1967, he received the order to report for induction that is challenged here. The fact that he later became a full-time student, in September 1967, did not relieve him from the obligation to comply with that order; the order was not subject to rescission because petitioner subsequently became a full-time student again (see 32 C.F.R. 1625.2; compare 32 C.F.R. 1625.3(b)).

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beit there, unlike in *Oestereich*, it was unclear that there had been any violation of Selective Service regulations at all. *Wolff* is thus wholly inapposite.

[4] In *Oestereich* the registrant was concededly entitled to the unconditional statutory exemption for ministers and ministerial students (see 50 U.S.C. App. 456(g)). Here petitioner's only claim is to a student deferment (see P. L. 90-40, amending 50 U.S.C. App. 456 (h)). Nor is his right to such deferment by any means conceded.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

AUGUST 1968.

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